IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5021 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT RESEARCH & MEDICAL INSTITUTE

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 5021 of 2002
MR SB VAKIL with MR ASPI M KAPADIA for Petitioner
MR MUKESH R SHAH for Respondents No. 1-3

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 16/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner-Gujarat Research & Medical Institute, a Public Charitable Trust registered under the

Bombay Public Trusts Act, 1950 and running the hospital called "Rajasthan Hospital" has challenged the order dated 16/21.11.2000 (Annexure "A") issued by the Deputy Director General (M) with the approval of the Director General of Health Services and Secretary (Health), Ministry of Health and Family Welfare of the Central Government.

2. While import of equipments, apparatus and appliances required for being utilized by the hospitals would ordinarily be subject to the customs duty, the Central Government issued general exemption order No. 104B granting exemption to hospital equipments imported by specified category of hospitals (charitable) subject to approval from the Director General of Health Services (DGHS). The said exemption order is issued in exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (hereinafter referred to as "the Act"). By the said exemption order, the Central Government exempted all equipments, apparatus and appliances, including spare parts and accessories thereof, by excluding consumable items (hereinafter referred to as "the hospital equipment"), the import of which was approved either generally or in each case by the Government of India in the Ministry of Health and Family Welfare or by the Directorate General of Health Services to the Government of India as essential for use in any hospital specified in the Table to the said exemption order. There is no dispute about the fact that the hospital run by the petitioner-trust is a hospital approved by the Ministry of Health and Family Welfare for the purposes of the said exemption order. The relevant clause of the exemption order reads as under:-

"2. All such hospitals which may be certified by the said Ministry of Health and Family Welfare, in each case, to be run for providing medical, surgical or diagnostic treatment not only without any distinction of caste, creed, race, religion or language but also,-

(a) free, on an average, to at least 40 per cent of all their outdoor patients; and

(b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and

(c) at reasonable charges, either on the basis of the income of the patients concerned or otherwise, to patients other than those specified in clauses (a) and (b)."

3. The petitioner herein was issued Customs Duty Exemption Certificates (CDCEs) under notification No. 64/88-Cus dated 1.3.1988 in respect of the following items (with date of CDCE Certificate stated against each item) :-

Sr. No	Item	Date of CDCE
1.	Kidney Stone Lithotripter Model XI with accessories.	28.12.1989
2.	Urology/Endoscopy instruments.	22.07.1991
3&4	Categorization certificate for spare parts of kidney stone lithotripter.	19.09.1991 & 19.12.1991
5.	Shimadzu whole body CT scanner model SCT-3000 TE	29.06.1992
6.	Shimadzu Single Plane Cardiac Cath Lab System.	11.11.1992
7.	Apogee cx 200 Eco Machine	18.03.1994

4. Thereafter, a public interest litigation was filed in the Delhi High Court alleging loss to the public exchequer by evasion of customs duty on import of medical equipments under the aforesaid notification by ineligible institutions. The Delhi High Court directed constitution of two Committees of Enquiry, one Committee for action of recovery of customs duty and overseeing the Customs Procedure and the other Committee called "Rosha Committee" to inquire into the details of the irregularities, malpractice, etc. which had occurred and the extent of evasion of customs duty on account of misuse of the provisions of the notification. The Rosha Committee vide its letters dated January, 1997 (Annexures "G" and "H") called upon the petitioner to furnish certain information regarding compliance with the conditions of the aforesaid exemption notification. Vide its reply dated 17.2.1997 (Annexure "I"), the petitioner

submitted the information. The Rosha Committee again sought further information from the petitioner which the petitioner supplied. In the meantime, a team of officers attached to the Directorate of Revenue Intelligence, Baroda also visited the hospital in July 1997 and verified the records and documents at the hospital. The Customs authorities also issued show cause notice dated 23.12.1997 and 28.11.1997 calling upon the petitioners to show cause why the medical equipments should not be confiscated under the provisions of the Act; why customs duty should not be recovered from the petitioner and why penalty should not be imposed under the Act. The order in original dated 31.3.1999 came to be passed by the Commissioner of Customs which has been challenged by the petitioner before the CEGAT and the CEGAT passed some interim orders dated 29.11.1999. In these proceedings, we are not going into details of those proceedings as obviously the petitioner would not challenge the orders passed by the Customs authorities when those orders under the Customs Act are challenged before the proper appellate authorities under those Acts. However, the Director General of Health Services has passed the order dated 16/21.11.2000 withdrawing the aforesaid Customs Duty Exemption Certificates as cancelled with immediate effect on the ground that the percentage of free OPD treatment was below 40% for the year 1990-91 (36.80) and 1992-93 (38.85) and also on the ground that the percentage of free indoor treatment shown for the years 1994 to 1998 is 7.86%, 6.63%, 5.36%, 5.15% and 5.47% which is not commensurate with the 10% beds reserved for patients whose income was less than Rs.500/p.m. The Director General, therefore, gave the finding that the petitioner failed to fulfill the post import conditions enumerated in the notification and thus is not eligible to retain Customs Duty Exemption Certificates issued to the petitioner. Therefore, the certificates issued to the petitioner under the aforesaid notification are withdrawn as cancelled with immediate effect.

It is the aforesaid order which is under challenge in this petition.

5. When the petition came up for hearing on 10.5.2002, this Court issued notice to the respondents. Affidavit in reply has been filed by the Joint Director of Health Services, Regional Officer, Health and Family Welfare, Ahmedabad followed by affidavit in rejoinder on behalf of the petitioner.

6. At the hearing of this petition, Mr SB Vakil, learned senior counsel for the petitioner has raised the

following contentions :-

6.1 Once the Director General of Health Services issued the certificates under the aforesaid notification dated 1.3.1988, he became functus officio and he had no power or authority to cancel the certificates for any reason whatsoever.

6.2 The impugned order is passed by the Director General without affording the petitioner a reasonable opportunity of being heard and, therefore, the impugned order has been passed in violation of the principles of natural justice.

6.3 The authorities have not considered all the relevant facts including the fact that the petitioner has substantially complied with the conditions and that out of 10 years, in as many as 8 years, the number of OPD patients treated free is above 40% and that in the years 1997-98 and 1998-99, the percentage had gone up to 87% and even 100%.

6.4 As regards indoor patients also, the petitioner has always reserved 10% beds for giving free treatment to the patients with family income of less than Rs. 500/per month, but if the number of such patients with family income of less than Rs.500/- per month are less in the city like Ahmedabad or the patients with the family income of Rs.500/- per month turned up less in number than 10% beds reserved for them, the petitioner cannot be penalized by cancellation of the certificates.

6.5 As far as the Customs Duty Exemption Certificates issued on 19.12.1991, 29.6.1992, 11.11.1992 and 18.3.1999 are concerned, the alleged deficits in the prior years cannot entail any adverse obligations to the petitioner.

7. Mr MR Shah, learned additional standing counsel for the Central Government appearing for the respondents has vehemently opposed the petition and submitted as under :-

7.1 The certificates issued to the petitioner must be read in light of the exemption notification dated 1.3.1988 which casts a continuous obligation on the petitioner to provide free treatment to atleast 40% of the outdoor patients and to give free treatment to all indoor patients belonging to families with an income of less than Rs.500/- per month and to keep at least 10% of all the hospital beds reserved for such patients. It is submitted that once it is found that the conditions are

not complied with, the authority issuing the certificate has the power to cancel or withdraw the certificate. In support of the said submission, reliance is placed not only on the provisions of Section 21 of the General Causes Act, but also on the decisions of the Hon'ble Surpeme Court in M/s Mediwell Hospital and Heaths Care Pvt. Ltd. vs. Union of India, 1997 AIR SCW 424 = AIR 1997 SC 1623 and in Commissioner of Customs (Import) vs. Jagdish Cancer & Research Centre, 2001 AIR SCW 2854. The learned counsel has also relied on the decision of the Karnataka and Punjab & Haryana High Courts holding that the authority does have the power to revoke or cancel the certificates issued under the exemption notification dated 1.3.1988.

7.2 As regards the question of alleged breach of the principles of natural justice, it is submitted that the petitioner was was required to submit all the requisite information as per the letters produced with the petition. By letter dated 19.4.2000, the Directorate General of Health Services invited the attention of the petitioner to the terms and conditions laid down in the aforesaid notification dated 1.3.1988 and pointed out that the Directorate was reviewing all cases whether they are fulfilling the conditions agreed at the time of importation and the following information was sought for from the petitioner :-

(i) (a) Whether the medical equipment has been installed in the premises of the hospital,

(b) If yes, date of installation of each equipments;

(ii) (a) Total no. of OPD patients treated since installation of medical equipment year-wise (upto 1999);

(b) Total no. of OPD patients treated free during the above period yearwise;

(c) Percentage of OPD patients treated free during the above period yearwise;

(iii) (a) Total no. of indoor patients treated since installation of the medical equipment yearwise (upto 1999);

(b) Total no. of indoor patients belonging to families with an income of less than

Rs.500/- p.m. treated during the above period yearwise;

(c) Total no. of indoor patients belonging to families with an income of less than Rs.500/- p.m. treated free during the above period yearwise;

(iv) (a) Total no. of beds speciality wise;

(b) Total no. of beds reserved for indoor patients belonging to families with an income of less than Rs.500/- p.m.

(c) Percentage of free beds reserved for patients as stated under (b) above."

It is also mentioned in the said letter that if no information was received within the period stipulated in the letter, it would be presumed that the petitioner was not interested in retaining Customs Duty Exemption Certificates issued earlier for the hospital equipments in question.

It is submitted that it was pursuant to the said letter from the Directorate General of Health Services that the petitioner had supplied the information and on the basis of the said information alone the Director General had taken the decision to cancel the certificates as it was found that the petitioner had not complied with both the conditions stipulated in the exemption notification. It is, therefore, submitted that no further hearing was required to be given to the petitioner and, there was sufficient compliance with the principles of natural justice.

7.3 As regards the contention that the petitioner had provided free treatment to more than 40% of the outdoor patients, reliance is placed on the decision of the Apex Court in Commissioner of Customs (Import) vs. Jagdish Cancer & Research Centre, 2001 AIR SCW 2854 and particularly the finding given by the Hon'ble Supreme Court in the aforesaid decision rejecting the contention of the petitioner in that case that marginal shortfall in providing free treatment cannot attract the cancellation of the certificate and that during certain period the percentage may be little less or little higher, but the Supreme Court negatived that contention and held that a perusal of the condition in the notification indicates that on an average at least 40 per cent of all outdoor patients should be provided free treatment and even the

argument that the percentage could be achieved during the life of the equipment imported was rejected and the argument that shortfall of particular year may be made good in the following year was also rejected. It should generally be all through the period. It being at least 40 per cent, there is hardly any occasion to say that in case there is more than 40 per cent in a given period, that may make good the deficiency in the previous or the following year.

7.4 As regards the percentage of indoor patients, it is submitted that when the percentage was less than 10%, there is breach of condition and, therefore, the impugned order was fully justified.

8. Having heard the learned counsel for the parties, we will deal with the first contention raised by Mr Vakil for the petitioner. The contention is that once the Director General issued the certificates, the certificates cannot subsequently be cancelled and that the reliance placed on the provisions of Section 21 of the General causes Act in this behalf is misconceived.

9. Before dealing with the aforesaid contention, it is necessary to set out the conditions stipulated by the exemption notification dated 1.3.1988:-

"2. All such hospitals which may be certified by the said Ministry of Health and Family Welfare, in each case, to be run for providing medical, surgical or diagnostic treatment not only without any distinction of caste, creed, race, religion or language but also,-

(a) free, on an average, to at least 40 per cent of all their outdoor patients; and

(b) free to all indoor patients belonging to families with an income of less than rupees five hundred per month, and keeping for this purpose at least 10 per cent of all the hospital beds reserved for such patients; and

(c) at reasonable charges, either on the basis of the income of the patients concerned or otherwise, to patients other than those specified in clauses (a) and (b)."

Once the aforesaid conditions are considered in the context of the object for which the exemption is

granted, it is obvious that the conditions are applicable after the medical equipments are imported by the hospital and installed within the hospital premises. Hence, the question of complying with the conditions would arise only for the future period i.e. after installation of the imported medical equipments within the hospital premises. Hence, the question of considering whether the concerned institution has complied with the conditions or not would also arise after the installation of the medical equipments and after issuance of the Customs Duty Exemption Certificate by the Director General of Health Services. To contend that once the Director General has issued the Customs Duty Exemption Certificate, the same cannot be withdrawn would run counter to the very scheme of the exemption notification dated 1.3.1988.

10. The learned counsel for the petitioner has, of course, relied on the following decisions in support of his contention that once exemption certificates are issued, they cannot be cancelled merely by invoking the so called power under Section 21 of the General Clauses Act :-

(i) Dosabhai Ratansha Keravala vs. State of Gujarat, 9 GLR 361
(ii) Stawboard Mfg. Co. vs. G. Mill Workers' Union, AIR 1953 SC 95
(iii) Kazi Lhendup Dorji vs. Central Bureau of Investigation, 1994 Suppl. (2) SCC 116
(iv) K. Chandrasekhar vs. State of Kerala, 1998 (5) SCC 223
(v) Kolhapur Canesugar Works Ltd. vs. Union of India, 2000 (2) SCC 536
(vi) Govt. of A.P vs. YS Vivekananda Reddy, AIR 1995 A.P. 1
(vii) M Scientific Research Centre vs. Lakshman Prasad, (1998) 229 ITR 23.

11. The aforesaid authorities may prima facie appear to be dealing with the power of an authority for withdrawing or cancelling the exemption certificate. However, a close reading of the aforesaid authorities indicates that what is disapproved in the aforesaid decisions is the retrospective cancellation of the exemptions or notifications under Section 4 of the Land Acquisition Act or similar orders issued in exercise of similar other powers.

For instance, in Dosabhai Ratansha Keravala vs. State of Gujarat, 9 GLR 361, the Division Bench of this Court had an occasion to consider the question whether

the Government can rescind a notification under Section 4 or under Section 6 of the Land Acquisition Act, 1894 with retrospective effect. In that context, this Court observed as under :-

> "It is always open to Government to rescind a notification under sec. 4 or under sec. 6. But this power does not include a power to rescind the notification with retrospective effect. Sec. 21 of the General Clauses Act merely enacts a rule of interpretation. It does not confer any new power. All that it says is that where there is power to issue a notification, it must be construed as also impliedly giving a power to cancel the notification. But the cancellation which is so authorized as a matter of statutory interpretation is prospective cancellation. The first sec. 6 notification could not, therefore, be cancelled with retrospective effect. The cancellation of the first sec. 6 notification was prospective : it took effect on the date on which it was made. The first sec. 6 notification was not obliterated or wiped out altogether : it did not cease to exist ab initio as would have been the case if the cancellation had been retrospective in effect. It was valid when born and having spent a useful life of about three months, it was killed by positive action in the shape of cancellation notification. Since the cancellation was prospective in operation, the first sec. 6 notification continued to have valid existence upto the date of cancellation : the legal effect of exhaustion of sec. 4 notification which flowed on issue of the first sec. 6 notification was, therefore, not obliterated or set at naught."

There can be no quarrel with the aforesaid principle which this Court is in any case duty bound to follow. There is nothing to indicate in the impugned order that the Customs Duty Exemption Certificates issued by the Director General at the relevant time are cancelled retrospectively in the sense that the import of the medical equipments without payment of customs duty would be treated as illegal ab initio or clandestine. All that the certificate purports to do is to record the fact that the petitioner has not complied with the conditions stipulated in the exemption notification dated 1.3.1988.

12. It is true that Mr Vakil's argument is that since

the certificate is issued under the exemption notification dated 1.3.1988 which was issued for exempting the concerned hospitals from paying customs duty on such imported medical equipments, the action can be taken only by the authorities under the Customs Act. At the same time, the fact remains that it was the Director General of Health Services who had issued the Customs Duty Exemption Certificates after verifying the petitioner's eligibility for the grant of exemption. If the same authority also undertakes the exercise of finding out whether the conditions stipulated in the notification are complied with or not, the said exercise cannot be said to be beyond the authority or power of the Director General of Health Services merely because the authorities under the Customs Act also have the power to inquire into the question whether the conditions stipulated in the exemption notification were complied with or committed breach of.

Section 111 (o) of the Customs Act confers power on the authorities to confiscate the goods brought only from a place outside India, in respect of any goods exempted, subject to any condition, from duty ... ... under the Customs Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer. Section 112 also makes any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 liable for penalties under Section 112 of the Customs Act.

Sub-section (1) of section 125 requires the authority to give the person liable an option to pay fine in lieu of confiscation. Sub-section (2) thereof provides that where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

13. It is not possible to accept the contention urged by the learned counsel for the petitioner that because the exemption notification dated 1.3.1988 does not expressly confer any power on the Director General of Health Services to cancel the Customs Duty Exemption Certificate, the Director General has no power to cancel the certificate. As stated earlier, if such certificate were to be cancelled retrospectively making the importer liable for penal consequences for importing without payment of duty, different consideration would arise.

But, here the only action being taken is the cancellation of license with prospective effect so that if the customs duty becomes payable on the finding that the conditions are not complied with, the liability to pay customs duty would arise. Since the view that we are taking is that the cancellation of the certificate is with prospective effect and not with retrospective effect, all the above referred decisions cited by the learned counsel for the petitioner are not required to be dealt with separately.

14. Coming to the second contention, the submission of Mr Vakil for the petitioner is that all that the respondents had done by the letter dated 19.4.2000 at Annexure "M" was to call for certain information. It was only if the information were not supplied by the petitioner that the respondents would have been justified in presuming that the petitioner was not interested in retaining the customs duty exemption certificates and the authorities could have decided the matter against the petitioner, but the said letter did not call upon the petitioner to show cause why the certificates already issued earlier should not be cancelled. It is, therefore, submitted that when the petitioner is to be fined and serious civil consequences are to ensure the petitioner is entitled to be given a reasonable opportunity of being heard which has been denied to the petitioner in the facts of the present case.

15. Mr MR Shah for the respondents submits that when the conditions stipulated in the statutory exemption notification dated 1.3.1988 are construed to be mandatory by the Apex Court, the consequence for non-compliance with the conditions would follow as a matter of course and as a necessary corollary to the factum of non-compliance with the conditions, it was not necessary for the respondent authorities to issue any show cause notice as such. It is further submitted that in any view of the matter, when the petitioner has not complied with the conditions, giving the petitioner any opportunity of hearing may not make much sense when the conditions are mandatory.

16. Having heard the learned counsel for the parties, we are of the view that there is some substance in the submissions made by Mr Vakil for the petitioner that when the cancellation of the license would involve serious consequences, the petitioner was entitled to be afforded a reasonable opportunity of being heard. It is true that by letter dated 19.4.2000 the authorities had called upon the petitioner to submit certain information. However, it is one thing to require a party to furnish information

and quite another to put the party to notice that on the ground of non-compliance with the mandatory conditions, the certificates already issued in favour of the party would be withdrawn or cancelled.

17. As regards the submission of Mr Shah for the respondents that non-compliance with the conditions would automatically result into cancellation of the certificates overlooks the submission being made on behalf of the petitioner that the details about the number of outdoor patients given free treatment would work out differently if the data is given with respect to a calender year and not with respect to a financial year. The rebuttal of Mr Shah that such information was given by the petitioner itself with respect to the financial years does not take away the option of the petitioner to give the requisite information with respect to a calender year because, according to the petitioner, if the data given earlier is recomputed with respect to the calender years, a much positive picture is likely to emerge. For this purpose, reference is made to the figures given in paragraph 2.4 of the petition. Reference is made to these figures only for the limited purpose of recording the finding that the show cause notice and an opportunity of hearing might have made some difference to the outcome of the proceedings for cancellation of the Customs Duty Exemption Certificates which were issued in favour of the petitioner in the year 1991 or thereabout.

18. It may also not be out of place to state that even in the order-in-original dated 31.5.2002, the Additional Commissioner of Customs, Mumbai, it has been stated that since the hospital did provide free medical treatment to a large extent, if not fully as per conditions of the notification No. 64/88, a lenient view is warranted. It would, therefore, be open to the petitioner to point out all the relevant facts before the Director General of Health Services on the basis of such data as it may be in a position to produce before the authority and such other explanation as may be available to it.

19. Of course, since the impugned order was already passed in November, 2000 and, therefore, the petitioner is now made aware about the possible consequences, instead of directing the respondents to issue a fresh show cause notice, the interests of justice would be served if the respondents as well as the petitioners are directed to treat the impugned communication dated 16/21.11.2000 at Annexure "A" to the petition as a show cause notice to which the petitioner will be at liberty

to submit its reply by 30.9.2002. Thereafter, the respondents shall be at liberty to proceed further in accordance with law.

20. In view of the aforesaid finding on contention No. 2, it is not necessary for the Court to go into the merits of the controversy raised on behalf of the petitioner in contention Nos. 3, 4 and 5.

21. In view of the above discussion, the petition is allowed to the extent that the impugned communication dated 16/21.11.2000 shall not be treated as an order cancelling the Customs Duty Exemptions Certificates issued in favour of the petitioner under notification No. 64/88-CUS dated 1.3.1988, and the same shall be treated as merely a show cause notice to which the petitioner will be at liberty to submit his reply by 30.9.2002. Needless to state that the respondents will thereafter be at liberty to proceed further in accordance with law after considering the petitioner's reply and after giving the petitioner an opportunity of being heard. As and when the petitioner receives any such notice of hearing, the petitioner will cooperate for the expeditious disposal of the matter.

Rule is made absolute to the aforesaid extent only with no order as to costs.

22. It is clarified that the directions given hereinabove are only for the limited purpose of deciding the controversy about cancellation/withdrawal or otherwise of the Customs Duty Exemption Certificates by the Director General of Health Services and that they are not intended to govern or affect in any matter the proceedings before the authorities under the Customs Act.

(M.S. Shah, J.) (K.A. Puj, J.)

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